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No. 91-763

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

REPUBLIC OF ARGENTINA and BANCO CENTRAL DE LA REPUBLICA ARGENTINA,

Petitioners,

vs.

WELTOVER, INC., SPRINGDALE ENTERPRISES, INC., and BANK CANTRADE, A.G.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF WELTOVER, INC., SPRINGDALE ENTERPRISES, INC. AND BANK CANTRADE A.G.

RICHARD W. CUTLER
Counsel of Record
475 Fifth Avenue
New York, New York 10017
(212) 679-8787

Of Counsel:
JOEL I. KLEIN
KLEIN FARR SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

Attorneys for Respondents

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QUESTIONS PRESENTED

1. Whether petitioners' issuance of internationally-negotiable bonds is a "commercial activity" under the Foreign Sovereign Immunities Act.

2. Whether respondents' loss from petitioners' intentional failure to make interest and principal payments in New York as required by the bonds is a "direct effect" under the Foreign Sovereign Immunities Act.

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STATEMENT OF THE CASE

Respondents own $1,330,000 of bonds issued by petitioners in 1982. These bonds are denominated and payable only in United States dollars and for that reason are known as "Bonods". In 1986 petitioners defaulted on these Bonods. Respondents brought this action under the Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§1602 *et seq.*, to recover their principal and accrued interest.

Respondents Weltover, Inc. and Springdale Enterprises, Inc. are corporations organized under the laws of Panama, and they are assignees of original holders of the Bonods. Respondent Bank Cantrade, A.G. is organized under the laws of Switzerland, and it is an original holder of the Bonods. There are no corporations to be listed pursuant to Rule 29.1.

Petitioners are the Republic of Argentina and its central bank.

In 1982 petitioners effectively nationalized the multi-billion foreign debt of Argentine commercial corporations. They assumed this debt by issuing the Bonods and promissory notes to the creditors of those corporations. JA 17, §9.

The Bonods are rather ordinary financial instruments. They provide for scheduled payments of interest and principal, which were to be completed in November 1987. JA 23-24. The Bonods are internationally-negotiable, except to citizens and residents of Argentina. JA 24. They are denominated in United States dollars because respondent Republic of Argentina does not have a currency that is acceptable internationally. JA 14, §4.

Principal and interest payments are to be made in one of four world financial centers, including New York City, at the exclusive option of the bondholder. JA 25.

For a while petitioners made scheduled interest payments. Each of the respondents received payment in the United States. In May 1986, at the time the first portion of principal was payable to bondholders, petitioners defaulted. JA 9-11. Petitioners tried to make respondents "roll over" the Bonods into other securities, but respondents refused. JA 9-11. It should be noted that petitioners' default was unilateral and was not the product of any cooperative enterprise of world financial organizations. Pet. App. A at 4a.

Petitioners have acknowledged their default, although their affiant refers to it as an "adjustment of capital maturity dates". JA 18, §12.

In 1989 respondents brought this action under the FSIA in the United States District Court for the Southern District of New York. Petitioners moved to dismiss the complaint on the grounds that there was not subject matter jurisdiction under the FSIA, that there was not personal jurisdicition of the petitioners, and on the grounds of *forum non conveniens*. Their motion was denied in its entirety.

In 1991 petitioners appealed the denial of their motion, regarding subject matter jurisdiction only, to the United States Court of Appeals for the Second Circuit. The Second Circuit held that issuing the Bonods was a commercial activity in that it "immersed [the petitioners] in the stream of international commerce" and that petitioners' failure to pay in New York according to the Bonod terms was a "legally significant act" causing direct effects "in New York when [respondents'] accounts were not credited with. . .U.S. dollars." Pet. App. A. 10a, 14a.

SUMMARY OF ARGUMENT

The Petitioners's breach of their contractual obligations in the Bonods is an act outside the United States in connection with a commercial activity, and it caused a direct effect in the United States in connection with a sovereign's commercial act. Under the Foreign Sovereign Immunities Act, Petitioners are liable to suit in United States courts. 28 U.S.C. §§1604, 1605(a)(2).

The plain meaning of the FSIA is that the nature of the Bonods, not Petitioners' purpose, determines the commercial nature of the Bonods. 28 U.S.C. §1603(d). Negotiable debt instruments like the Bonods are by definition commercial. They exist as an exchange of the fundamental commercial medium in the classic commercial equation: money for time. The decisions of the lower courts support this conclusion of commerciality. Their primary investigation in determining commerciality under the FSIA is whether a private party could carry out the type of activity in question. If so, the activity is commercial, regardless of the purpose for which the sovereign undertook it. This concentration on nature rather than purpose fully complies with the plain meaning of the statute. Petitioners'

argument boils down to the purpose for which they issued the bonds. Legislative history, to the extent that it is relevant given the clear statutory mandate of Congress, supports the idea that the Bonods are just like any other commercial instrument under the Act.

Petitioners were obliged to perform their contract entirely within the United States at respondents' demand. When they defaulted, the loss was felt here in New York City, where respondents' accounts were to be credited. The loss was directly the result of petitioners' election not to pay. It was a substantial effect, since petitioners' payment constituted all executory performance under the Bonods. The effect was foreseeable, as petitioners intended that the defaulted payments not be made. Finally, petitioners once more attempt to read the statute with requirements that Congress never wrote into it: Their argument that there cannot be a direct effect because petitioners are not subject to due process jurisdiction confuses two important — and separate — concepts. More than that, their voluntary implication of the United States in the entire Bonod process — by selecting New York as a place of payment and by making the Bonods payable in U.S. dollars — makes them entirely open to suit in this country: Petitioners were able to offer the Bonods only by banking on the security and stability of our government and our financial system.

ARGUMENT

The FSIA was designed to remove one particular barrier to suit, the immunity of foreign sovereigns. *Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981). The Act provides jurisdiction over foreign states whenever a sovereign's "act outside the United States in connection with a commercial activity of the foreign state elsewhere. . . causes a direct effect in the United States." 28 U.S.C. §1605(a)(2).

The FSIA does not limit suits against sovereigns based on the citizenship of the plaintiff. A foreign corporation or individual may prosecute an action as long as the substantive standards of the FSIA are satisfied. *Verlinden, B.V., v. Central Bank of Nigeria*, 461 U.S. 480, 490-91 (1983).

Petitioners' issuance of the Bonods involves commercial activity, and their failure to make payment in New York, as required by the Bonods, caused a "direct effect" in this country.

I. PETITIONERS' ISSUANCE OF THE BONODS WAS COMMERCIAL ACTIVITY UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The FSIA expressly provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or activity or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. §1603(d). A straight-forward application of this statutory definition compels the conclusion that petitioners were engaged in commercial activity. Viewed in terms of their nature, and not in terms of their purpose, the Bonods are simply a debt instrument embodying a classic commercial transaction. Petitioners' contrary argument rests on an inversion of the FSIA's language and a misrepresentation of its legislative history.

A. Under the plain language of the Act, the nature of a sovereign's conduct determines that conduct's commerciality.

The starting point for any issue of statutory interpretation, of course, is the ordinary meaning of the language of the statute.

See, e.g., Demarest v. Manspeaker, ____U.S.____, 111 S.Ct. 599, 602 (1991). When such language is "clear and unambiguous, that is the end of the matter, for the court . . . must give effect to the unambiguously expressed language of Congress." *Mobil Oil Exploration v. United Distribution Co.*, ____U.S.____, 111 S.Ct. 615, 623 (1991) (Internal quotations omitted.); *see, United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989).

The application of this standard demonstrates that the Bonods are commercial. The petitioners contracted to pay back borrowed money in New York City (or other international financial centers) with interest in United States dollars. They did so by issuing internationally-negotiable bonds. This Court need not go farther than a passable dictionary to determine that petitioners' conduct "relates to or [is] connected with trade and traffic or commerce in general", *Black's Law Dictionary, 5th Ed.*, (St. Paul 1979), and is "of, in or . . . related to or dealing with commerce . . . used in or characteristic of commerce." *Webster's Third International Dictionary* 456 (Springfield, Mass. 1986). Examples of international commerce are the flow of "[g]oods and services . . . from one nation to another" and the flow of "[c]apital . . . for the establishment of a foreign enterprise." Vishny, *Guide to International Commerce Law* § 1.01 (Colorado Springs, 1981). An individual's negotiable debt instruments are covered in this country by the Uniform Commercial Code. *e.g.*, N.Y. L.1962, Ch. 553, Article 3, §3-102.

The Second Circuit was thus plainly correct when it described the nature of petitioners' conduct as "clearly" commercial, Pet. App. A at 10a, and when it deemed the commerciality of a nation's negotiable promissory notes "self-evident", *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1018 (2d Cir. 1991). Commerciality is inherent in certificates of deposit held by a later-nationalized bank, *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109-10 (5th Cir. 1985), *West v. Multibanco Comerex, S.A.*, 807 F.2d 820, 825 (9th Cir. 1987), and in letters of credit, *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 310 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

The conclusion that negotiable debt instruments like the Bonods are properly construed as commercial is also fully consistent with the lower courts' application of the commercial exception. In essence, those courts have asked whether a private person can perform the *type* of activity sued upon, or whether that type of activity can be performed only by a sovereign. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1549 (D.C. Cir. 1987) *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, *supra*, 647 F.2d at 309; *Velidor v. L/P/G/ Benghazi*, 653 F.2d 812, 817, n.7 (3d Cir. 1981), *cert. dismissed*, 455 U.S. 929 (1982); *Callejo v. Bancomer, S.A.*, *supra*, 764 F.2d at 1109; *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 452 (6th Cir. 1988); *Rush-Presbyterian-St. Luke's Medical Ctr. v. Hellenic Republic*, 877 F.2d 574, 580 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Meadows v. Dominican Republic*, 817 F.2d 517, 523 (9th Cir.), *cert. denied*, 484 U.S. 976 (1987).

This analysis of the *nature* of the conduct, rather than its purpose, ensures fidelity to the plain meaning of Section 1603(d). Obviously, any act by a sovereign is at least theoretically grounded in an ultimate public purpose; but under the FSIA, that is not a determinant of commerciality. This point has been repeatedly emphasized. Thus, for example, an agreement to promote Spanish wines is commercial, although the overall purpose is to reduce Spanish unemployment. *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987). An agreement that doctors perform kidney transplants on Greek citizens is commercial, although the overall purpose is to implement the Greek national health plan. *Rush*, *supra*, 877 F.2d at 580. A lease to rent a consular residence is a commercial transaction, although the purpose is clearly diplomatic. *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988). By the same token, the Bonods – contracts to rent money – are commercial, even though petitioners allege that their purpose was to implement a public policy.

B. Under the plain language of the Act, as well as the legislative history of the Act, Petitioners' purpose cannot be a factor in determining the commerciality of their conduct.

Petitioners' effort to argue that the Bonods are not within the commercial exception of §1605(a)(2) relies, to begin with, on a totally distorted interpretation of the statutory language. Seizing on the word "nature" in the definition of commercial activity, petitioners argue that one must study the "context" in which the sovereign's conduct occurs. Pet.Br. 18. That approach, however, eviscerates the nature/purpose distinction on which the statutory definition turns. Indeed, petitioners' entire argument rests on their assertion of *why* the Bonods were issued, to "address a domestic crisis. . .and to control [Argentina's] critical shortage of foreign exchange." Pet. Br. 23-24. Petitioners' "context" is only a euphemism for "purpose", and the plain language of the FSIA is not so easily evaded.[1]

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[1] Petitioners offer a single authority on this point, *DeSanchez v. Banco Central de Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). Even assuming that the plain meaning of the FSIA can be disregarded, *DeSanchez* is uniquely and easily distinguishable.

The plaintiff was the wife of President Somoza's top general and was safely ensconced in Miami. As that regime teetered, she sought to redeem a $150,000 (U.S.) certificate of deposit held in a Nicaraguan bank, but the terms of the certificate did not permit it. Nevertheless, the central bank was directed to sell to the depository bank the U.S. dollars necessary to effect the redemption, on the authority of the bank's president – General DeSanchez' cousin – and of President Somoza himself. By the time Sra. DeSanchez' American bank sent the check to Nicaragua for collection, the new government refused payment. The Fifth Circuit found this tainted transaction to be sovereign for a number of reasons, one of which was Nicaragua's purpose to protect foreign currency reserves.

No reported decision cites the result of *DeSanchez* as authority: It is an anomoly in FSIA jurisprudence. Petitioners' reference to the Seventh Circuit's commentary understandably omits that court's conclusion:

> [T]o give the "commercial exception" its proper scope, *DeSanchez* must be limited to the extraordinary circumstances before the court in that case. *Rush, supra*, 877 F.2d at 579, n.5.

(Footnote continued)

Petitioners also purport to find support for their position in the FSIA's legislative history. This argument is likewise untenable. As an initial matter, petitioners' reliance on legislative history —even if it were accurate— would be irrelevant here in view of the statute's clear language. *See, e.g., Burlington N.R.R. v. Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987). But petitioners' reading of legislative history is no better than its reading of statutory text. Thus, petitioners begin by citing a precursor to the final statute which contained a provision — omitted from the statute as adopted— that would have immunized "obligations incurred for general government purposes." Pet.Br. 14, n.11, quoting proposed but unpassed §1606 of HR 11315. Petitioners then reason that the rejection of this provision means Congress wanted case-by-case analysis of which debt obligations are commercial and which are not.

In fact, Congress's blanket elimination of a debt exemption provides strong support for the proposition that Congress meant to include *all* "debt obligations incurred for general governmental purposes" within the commercial exception. The report accompanying the Act confirms that view, explaining that the proposed debt exception was eliminated because

> [A] sale of bonds to the public. . .[is] *of a commercial nature and should be treated like other commercial transactions.* House Judiciary Comm., *Jurisdiction of U.S. Courts in Suits Against Foreign States*, H.R. Rep. No. 1487, 94th Cong., 2d Sess., *reprinted in* U.S.C.C.A.N., 6604 (the "House Report"), at 10. (Emphasis added.)

Even district courts which otherwise would be expected to adhere to the ruling have withdrawn from it. *Chisholm v. Bank of Jamaica*, 643 F.Supp. 1393, 1400, n.5 (S.D.Fla. 1986). ("The court is confident that the Fifth Circuit would have ruled otherwise under less stressful political conditions.") *Hester International Corp. v. Federal Republic of Nigeria*, 681 F.Supp. 371, 383 (N.D.Miss. 1988), *affirmed on other grounds*, 879 F.2d 170 (5th Cir. 1989). (*Texas Trading* and *Chisholm* are cited for the principles of determining commerciality; *DeSanchez* is not mentioned.)

See, id. at 16. [Specifying that a sovereign's "borrowing of money. . .would be [among the activities] included within the definition" of a commercial transaction.][2]

Accordingly, the legislative history, far from supporting petitioners, supports respondents' view that the Bonods are commercial.

Petitioners' emphasis on the sovereign nature of currency regulations, Pet.Br. 22-3, is equally unavailing. Petitioners now appear to argue that they were prevented from paying their obligations by currency regulations they themselves promulgated. If petitioners are really serious about this proposition, they must be arguing that any sovereign can abrogate the provisions of the FSIA simply by passing a law that prevents the sovereign from fulfilling its obligations. Again, petitioners seek to evade the FSIA rather than follow it.[3]

Ultimately our response returns to plain meaning: Under the FSIA, the nature of negotiable financial instruments is commercial; it does not matter why they were issued. And it is the plain meaning of the statute that petitioners' argument fails to overcome.

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[2] Petitioners misleadingly cite a sentence from a section of the House Report which deals only with "[c]ommercial activity carried on *in the United States* by a foreign state", *id.* at 17 (Emphasis added.), and which mentions two examples of that conduct. Petitioners conclude that "neither of those scenarios is present here." Pet. Br. 15. This tautology does not advance petitioners' cause as the instant case is not about commercial activity carried on in the United States but, rather, "commercial activity of the foreign state elsewhere." §1605(a)(2), clause 3 And debt instruments like the Bonods – as the proper references to legislative history make clear – do involve "commercial activity".

[3] Petitioners's reliance on *Braka v. Bancomer, S.N.C.*, 762 Fed.2d 222, 225 (2d Cir. 1985) is misplaced. Their cited quotation is the Second Circuit's explication of the "activity that implicates *act of state* concerns". 762 F.2d at 225 (Emphasis added.) Indeed, the district court deemed commercial the plaintiffs's certificates of deposit held in Mexican banks in Mexico, found subject matter jurisdiction under the FSIA, but dismissed the complaint because Mexico's actions comprised an act of state. *See Braka v. Bancomer, S.A. [sic]*, 589 F.Supp. 1465, 1470-1472 (S.D.N.Y. 1984). In any event, the act of state defense is relevant only after the court concludes that there is subject matter jurisdiction. *See, e.g.*, Pet. Br. 27.

II. PETITIONERS' BREACH OF THEIR BONOD OBLIGATIONS CAUSED A "DIRECT EFFECT IN THE UNITED STATES" UNDER THE ACT.

To come within the commercial exception of the FSIA, a plaintiff must show that the commercial activity in question has some nexus with the United States. House Report, *supra*, at 18. In particular, Section 1605(a)(2) of the FSIA sets out three conditions, any one of which is sufficient to satisfy this nexus requirement. Petitioners' failure to make payment in New York, as required by the terms of the Bonods, meets this requirement.

A. The breach of a contract to be performed in this country creates a direct effect in the United States.

The commercial exception applies "in any case. . . in which the action is based upon. . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." §1605(a)(2). In this case, respondents' claim is based specifically on petitioners' failure to make payments in U.S. dollars to respondents' accounts at New York banks designated by respondents.*

The direct effect, plain and simple, resulted from petitioners' non-performance of a contract that was by its terms to be performed in this country. Thus, this case is no different from one in which a foreign state reneges on an agreement to deliver a million pairs of shoes or a million tons of grain in this country, actions which self-evidently have a direct effect here. *See, e.g.*, Lowenfeld, "Claims Against Foreign States – A Proposal for Reform of United States Law," 44 N.Y.U. L. Rev. 901, 914-15 (1969):

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* Although it has not been argued before, petitioners' pattern of payment and breach could well be deemed acts "performed in the United States in connection with a commercial activity of the foreign state elsewhere." §1605(a)(2), clause 2. In that case, direct effect would not be a necessary element of subject matter jurisdiction.

> [A] contract . . . for delivery of a shipment at a pier in Hoboken is, in our system, the type of transaction giving rise to liability in New Jersey. Even if such a contract involves a foreign government – whether as buyer, seller, consignee or [*n.b.*] guarantor – the transaction and its potential for creating liability has not changed.[5]

Nor can this case be distinguished on the ground that petitioners' promised "cargo" was money. The computer network that can move millions of dollars around the world with an electromagnetic signal is as much a conveyor as the largest merchant steamer.

This interpretation of "direct effect" *is* the plain meaning of the statutory language, and it also has the virtue of enabling a foreign state to control its own destiny by choosing – or not choosing – a particular place of performance. In this case it is hard to see why petitioners should be heard to complain when *they* had the complete ability to avoid jurisdiction here simply by not making the Bonods payable in this country.

In view of these considerations, it comes as no surprise that, while petitioners are adamant in the belief that their actions had no "direct effect" here, they make no effort to locate that conclusion in the statutory language. Instead, their entire reliance on the statutory language is to assert, *ipse dixit*, that "[i]t is difficult to conceive" how respondents' loss could ever be a "jurisdictionally-sufficient direct effect." Pet.Br. 26-27. That argument merely reflects a limitation on petitioners' conceptual ability; it has nothing to do with the language of the FSIA. The truth is that petitioners never even attempt to suggest what a "direct effect" under the FSIA might be, precisely

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[5] Indeed, Professor Lowenfeld's proposed statute specifically held foreign sovereigns subject to jurisidiction in U.S. courts on any action based upon "an express or implied contract . . . to be performed . . . in the United States". Lowenfeld, *id.*

because they cannot provide a plausible definition that excludes this case.[6]

Absent any grounding in statutory language, petitioners are forced to misrepresent the holding below, to say that the Second Circuit "rested its finding" on public policy principles rather than the "effect of Petitioners' actions on Respondents". Pet.Br. 27. It is simplest to let the Second Circuit speak for itself:

> Here, the contract gave [respondents] the option to call for payment in New York. [Respondents] exercised that option. The legally significant act was defendants' failure to abide by the contract terms; i.e., to make payments in New York. The effects occurred when the [respondents'] accounts were not credited with the outstanding amount of U.S. dollars. As such, the act of nonpayment caused a direct effect in the United States. Pet. App. A at 14a[7].

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[6] Petitioners' reliance on the House Report does not assist their cause. The Report refers to Section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965), which provides that United States law may be prescribed when the effect in the U.S. is "substantial" and occurs "as a direct and foreseeable result of the conduct outside the country." These criteria are all satisfied here: The failure to perform was the "direct and foreseeable result" of petitioners' instructions not to honor the bonds in New York; and the effect was "substantial" in that it led to a *total* default of petitioners' obligation, not to a short delay or other minor deviation from the terms of performance. Thus, even if the House Report's reference to Section 18 can permissibly be used to add the words "substantial" and "foreseeable" to the actual statutory language – *i.e.*, "direct effect"– those additional criteria are met in this case.

[7] It is, in fact, petitioners who argue policy, albeit without support. Expectedly, they raise the spectre of our courts clogged with suits by foreign plaintiffs against foreign sovereigns. Pet.Br. 29. "Congress protected against this danger not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." *Verlinden*, *supra*, 461 U.S. at 490. The Court's quoted language was specifically in response to the very testimony petitioners cite in their brief. *Cf.* Pet.Br. 29.

Perhaps the most curious misconception that petitioners advance is that their breach of their obligation to pay in New York at a bondholder's demand is, nevertheless, a nebulous tie with the United States. This is not so much argument as self-fulfilling prophecy: Early on, when petitioners made their pre-default payments as they promised, they did indeed name specific New York banks to receive specific funds into specific accounts in New York and to distribute those funds to other specific accounts in New York, and there was a direct effect in the United States – a positive one – as respondents' accounts were credited. When petitioners breached their agreement, the effect was direct again, but this time quite negative.

It is, in short, indisputable that when a party has a contractual obligation to deliver money to *anyone* in the United States, the failure to deliver that money has a direct effect here. Petitioners so failed, and the direct effect resulted.

B. A determination of "direct effect" is separate from considerations of due process personal jurisdiction.

Apparently recognizing that the language of the statute provides them no support, petitioners for the first time in this Court take the position that the "nexus" reference in the House Report is identical to the due process requirement for *personal* jurisdiction. According to petitioners, if the courts of, say, New York County lacked personal jurisdiction over petitioners based on their activities concerning the Bonods, presumably it would follow that there could not be subject matter jurisdiction. *See* Pet.Br. 29-40[8].

The distinction between the standards for subject matter jurisdiction and due process personal jurisdiction is quite significant. Under the FSIA, subject matter jurisdiction (under Sections 1605-1607) and good service (under Section 1608) result

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[8] It is axiomatic that a question not raised below or in the petition for certiorari is not properly before this court. *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981), *Heckler v. Campbell*, 461 U.S. 458, 469, n.12 (1983), citing *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

in statutory personal jurisdiction. 28 U.S.C. §1330(a)-(b) Of course, a suit can continue only when due process personal jurisdiction is present as well – that goes without saying. But the plain language of the FSIA does not remotely suggest that a court is constrained to look *only* to a plaintiff's allegations regarding the commercial exception in making the due process determination. Indeed, the regular procedure is to determine whether the subject conduct is immune, and if not, then to consider due process jurisdiction. *Maritime International Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1105, n.18 (D.C.Cir. 1982) (Immunity determination "involves considerations distinct from the issue of [due process] personal jurisdiction, and the FSIA's interlocking provisions are most profitably analyzed when these distinctions are kept in mind."); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C.Cir. 1982) (Citing *Texas Trading, supra*, that subsequent to the determination of subject matter jurisdiction is the issue of personal jurisdiction.); Kane, "Suing Foreign Sovereigns: A Procedural Compass," 34 Stanford L.Rev. 385, 404 (1982) ("Once the court decides that the foreign state is not immune, it must consider – as it does for every defendant – whether asserting jurisidiction would violate notions of minimal contacts and fair play. Here, too, a federal standard would control.").[9]

C. Assuming arguendo that findings of personal jurisdiction and subject matter jurisdiction are merged, petitioners' conduct provides subject matter jurisdiction under the Act.

Regardless of the validity of petitioners' attempted merger of subject matter and personal jurisdiction, however, their effort to abandon the statutory language of Section 1605(a)(2) in favor

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[9] In the district court, petitioners sought to dismiss the complaint on the additional grounds of lack of personal jurisdiction. The court denied that part of their motion as well, finding that "No serious claim can be made here that plaintiffs have failed to allege contacts of the defendants that would justify the exercise of personal jurisdiction over them." Pet. App. B at 26a. The contacts include petitioners' bank accounts, regular commercial activity, and availment of American law. *Id.*

of their analysis of personal jurisdiction turns out to be the equivalent of jumping from the frying pan into the fire. This court's cases demonstrate beyond doubt that petitioners' activities – even if limited only to the Bonods – support personal jurisdiction in the United States.

It is now well-settled that under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny, the decisive factor for personal jurisdiction analysis is whether defendant "purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). *See, Asahi Metal Ind. v. Superior Court*, 480 U.S. 102 (1985); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). "This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts. . . . *Jurisdiction is proper, however, where the contacts proximately result from the actions by the defendant himself. . . .*" *Burger King, supra*, 471 U.S. at 475. (Emphasis added, citations omitted.) *See also Asahi*, 480 U.S. at 112. (Finding of minimum contacts must come about from defendant's action purposefully directed to the forum.)

Petitioners' activities regarding the Bonods amply satisfy this standard. There is nothing "fortuitous" or "random" about petitioners' involvement with this country: Petitioners expressly chose to make New York one of four possible places for performance and required advance notice as to which of the four a particular creditor would select. J.A. 25. More importantly, by agreeing to pay in U.S. dollars, petitioners "purposefully availed" themselves of the benefits of this country's laws and the stability of its financial and currency markets and of our government. Without that stability petitioners could never have issued the Bonods in the first place. To put the matter bluntly, petitioners led investors to believe that they could secure payment in one of the four designated countries and that they could rely on the laws and, if necessary, the courts of those countries to enforce the Bonods. Surely no one would have accepted the Bonods if they could be enforced only in Argentina, in the same way that

no one would have accepted the Bonods (or purchased them on the international market) if they had been payable in Argentine australs.

Petitioners used the United States as a silent guarantor of the value of the Bonods: our currency, our financial markets, our government. They forget all this – or at least pretend to – now that they are called upon to meet their obligations. There is no basis at all for petitioners' belated claim that our courts lack subject matter jurisdiction over them with respect to their activities in issuing the Bonods.[10]

Ignoring these established principles, petitioners cite a few lower court cases for the proposition that "the fact that [a] note is payable in the forum state, *without more*, is not sufficient to support long-arm jurisdiction over the maker." Pet.Br. 33. (Emphasis added, footnote citations omitted.) In this case there *is* "more". Petitioners' cases involve one basic scenario: An individual in one state agrees to pay a note by wire or mail to a creditor in another state, and when there is a default, the creditor sues in his home state, although the debtor has never had anything to do with the forum, other than through the interstate banking system. *See* Pet.Br. 33-34 (citing cases). But even under those facts, as petitioners recognize, the courts are not in agreement as to whether personal jurisdiction exists. *See, e.g., Continental American Corp. v. Camera Controls Corp.*, 692 F.2d 1309 (10th Cir. 1982); *Federal Deposit Ins. Corp. v. Culver*, 640 F.Supp. 725 (D.Kan 1986). *Cf. Carnival Cruise Lines v. Shute*, __ U.S. __ 111 S.Ct. 1522 (1991). (Enforcing forum selection in boilerplate contract).

All of this, ultimately, is beside the point. Whatever the correct answer may be in the situation depicted by petitioners, it has no bearing here, where the *debtor* chose a payment forum

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[10] Despite petitioners' efforts to focus on *respondents'* contacts with this country, that consideration clearly has no bearing on *petitioners'* amenability to suit here. *See, e.g., Keeton v. Hustler Magazine*, 465 U.S. 770 (1984). As noted above, a foreign plaintiff can sue in the United States under the FSIA. *Verlinden, supra*.

other than its own jurisdiction – and a medium of currency other than its own – precisely because *absent the protection of the laws of that other forum*, the debtor would not have been able to market its bonds. Petitioners have not cited, and could not cite, a single case denying personal jurisdiction on facts anywhere near those presented here. Accordingly, to the extent that the nexus requirement of the commercial exception is tied to the requirements of personal jurisdiction, respondents' position that nexus is here is all the more compelling.

CONCLUSION

For all the reasons set forth above, the decision of the United States Court of Appeals for the Second Circuit should be affirmed in all respects.

Respectfully submitted,

RICHARD W. CUTLER
Counsel of Record
475 Fifth Avenue
New York, New York 10017
(212) 679-8787

Of counsel:

JOEL I. KLEIN
KLEIN FARR SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037-1311
(202) 775-0184